BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: J. L. MANTA 5233 Hohman Avenue Hammond, Indiana 46320 Employer	Docket No. 00-R2D2-2297 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by J. L. Manta (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Between December 10, 1999, and June 8, 2000, the Division of Occupational Safety and Health (the Division) conducted a complaint inspection at a place of employment maintained by Employer at 1380 San Pablo Avenue, Rodeo, California (the site).

On June 8, 2000, the Division issued to Employer Citation 1, Items 1, 2 and 8[1] alleging the violations and proposing the penalties that follow:

Cit/Item	**Section**	**Type**	**Penalty**
1/1	5144(i)(5)(D)[2] [air purification system records]	Regulatory	$375
1/2	5144(m)(2)(A) [respirator mask fit testing records]	Regulatory	$0
1/8	5194(f)(4) [labeling hazardous substance containers]	General	$375

[1] Citation 1 contained other items. Neither party petitioned for reconsideration of a decision or order pertaining to any of them. Therefore, they are not addressed in this Decision After Reconsideration.
[2] Unless otherwise specified all section references are to Title 8, California Code of Regulations.

Employer filed a timely appeal contesting the existence and classification of the violations and the reasonableness of the proposed penalties. At the hearing, Employer withdrew the reasonableness of the proposed penalties as a ground for its appeal and offered no evidence tending to prove that, assuming their existence, the violations were incorrectly classified.

On May 1, 2001 and February 26, 2002, a hearing was held before Bref French, a Board Administrative Law Judge (ALJ) in Concord, California. The parties submitted post-hearing briefs and, on August 13, 2002, the ALJ issued a written decision denying Employer's appeal from Citation 1, Items 1, 2 and 8.

On September 17, 2002, Employer petitioned the Board for reconsideration of the ALJ's decision. The Division filed opposition on October 18, 2002. On November 6, 2002, the Board took Employer's petition under submission and stayed the ALJ's decision.

Citation 1, Item 1, Regulatory Section 5144(i)(5)(D)

ISSUE

Did Employer have "at the compressor" a tag stating when and by whom the compressor's sorbent beds and filters had last been changed?

EVIDENCE

Employer cleans and services crude oil holding tanks and other oil refinery equipment and facilities. When inspected, Employer was at a Tosco refinery cleaning the sludge or residue out of a large, 225-foot diameter crude oil holding tank known as Tank 100.

Employees were working inside the tank wearing supplied air respirators. Through hoses, an air compressor set up outside the tank supplied air to the respirator masks the employees were wearing. The compressor is equipped with sorbent beds[3] to rid the air it supplies of odors and vapors, and filters to rid it of particulates. The beds and filters need to be changed periodically to maintain adequate air purity. To comply with section 5144(i)(5)(D) an employer must, "have a tag containing the most recent change date and the signature of the person authorized by the employer to perform the change…at the compressor."

Eric Berg (Berg), the inspecting Compliance Officer for the Division, testified that when he arrived at the site on December 10, 1999, the Tosco safety superintendent took him over to Tank 100 and introduced him to a man

[3] Charcoal beds that absorb organic vapors and odors from air passed through them.

who identified himself as Rick Byars and stated that he was in charge of the Tank 100 cleaning work Employer was doing. Berg said that he asked Byars to show him the tag containing the information about the last sorbent bed and filter change and Byars pointed out a green tag that stated when a carbon monoxide detector attached to the compressor had last been calibrated but contained nothing about changing the sorbent beds and filters. Berg then examined the exterior of the air compressor and found no other tags. There was a door on one side of the compressor housing. Berg did not recall whether he had opened the door and looked inside.

Peter J. Englebert (Englebert), Employer's Corporate Manager of Industrial Hygiene and Environmental Services, testified that Employer had rented the air compressor from Cresco Equipment Rental. A Cresco technician informed Englebert that inside the air compressor door there was a rolled sheet of paper inserted in a tube stating that Cresco employee Steve April had changed the air filters on November 9, 1999. Englebert identified Employer Exhibit I as a copy of the described document that Cresco faxed to him.

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Section 5144(i)(5) requires an employer to "ensure that compressors used to supply breathing air to respirators are constructed and situated so as to:

* * * * * *

> (C) Have suitable in-line air-purifying sorbent beds and filters to further ensure breathing air quality. Sorbent beds and filters shall be maintained and replaced or refurbished periodically following the manufacturer's instructions.
>
> (D) Have a tag containing the most recent change date and the signature of the person authorized by the employer to perform the change. The tag shall be maintained at the compressor.

Employer was cited under subsection (D) because Berg could not find the tag on or about the compressor and when he asked Byars, who said he was in charge for Employer, to show it to him, Byars pointed out a tag pertaining to another subject.

Employer argues that Berg should have known that the tag might be inside the compressor housing and, since Berg could not remember if he had opened the housing door and looked inside, the Division failed to prove that the tag was not "at the compressor." We disagree.

The air compressor was being used to supply air to employees in the tank. A person without training and experience in the operation of an air compressor should not open a door and reach inside its housing while it is running. The compressor motor <u>could</u> be interlocked to the door, so that

opening the door would cut off the supply of air to the employees depending on it, or there could be hazardously moving machine parts just inside the door. Even if machinery is not running, it is doubtful that a Cal/OSHA inspector should engage in the invasive practice of entering an employer's machinery. The inspector could cause accidental damage and entering a machine that has been turned off may still expose the inspector to a hazard.

Moreover, the tag Byars pointed out, indicating when the carbon monoxide monitor had last been calibrated, was attached outside the compressor, and it was reasonable to assume that any other required tag would be similarly attached so employees and inspectors could readily access the tag.

Under these circumstances, Berg's testimony was sufficient to prove that Employer, or its agent Cresco, had not maintained a tag describing the last sorbent bed and filter changes at the compressor.

Employer's countervailing evidence consisted of the testimony of Englebert who was not at the site when the inspection occurred and had no personal knowledge of whether there was a document containing the required information in or on the compressor or Cresco's business record practices. Engelbert's testimony concerning the identity of Exhibit I, the timing and mode of its preparation, and its location at the time of the inspection was based upon hearsay statements a Cresco technician made to him.

The Division had a standing objection to all hearsay evidence presented by Employer. Under section 376.2 [Evidence Rules] of the Board's "Rules of Practice and Procedure", "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Employer argues that Exhibit I would be admissible over objection in civil actions as a "writing made as a record of an act" pursuant to the "business record" exception to the hearsay rule set forth in Evidence Code section 1271. However, such a writing is admissible as proof of an act under that exception, only if:

> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event:
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and,
>
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Steve April, the Cresco employee who prepared Exhibit I or some other designated Cresco employee is the "custodian" of the original of the document that Cresco faxed to Employer. Receipt of questionably reliable hearsay information did not qualify Engelbert as a witness concerning Cresco's business recordkeeping practices. Hence, Employer failed to show that Exhibit I was excepted from the hearsay rule by Evidence Code section 1271. Moreover, as the ALJ pointed out in her decision, even if Exhibit I were excepted from the hearsay rule, it would not provide Employer with a defense to the charge. Exhibit I states when and by whom the last filter change was made but does not provide that required information with respect to the last sorbent bed change. Accordingly, we affirm the ALJ's finding that, by a preponderance of the evidence presented, the Division proved that Employer did not have the filter and sorbent bed last-change tag required by section 5144(i)(5)(D) at the compressor. A regulatory violation of that safety order was established against Employer.

Citation 1, Item 2, Regulatory
Section 5144(m)(2)(A)

ISSUE

Did Employer fail to establish respirator fit test records that identified the specific make, model, style, and size of the respirators tested?

EVIDENCE

The Division issued Item 2 because Employer did not "…establish a record of the [respirator mask] qualitative and quantitative fit tests administered to…[each of its] employee[s]" that clearly identified the "specific make, model, style, and size of respirator tested…." (§ 5144(m)(2)(A))

Employees who entered Tank 100 wore a "Scott-o-rama" model, full face respirator mask manufactured by Scott Aviation Corporation. Employer hired Code 3 & Associates to fit test the masks for the employees before they used them and to prepare the required fit test records. Compliance Officer Berg identified Division Exhibit 12 as the fit test records Employer provided in response to his request. Each record consists of a one page form captioned "Quantitative Fit Test Record."

Near the bottom of the page "Respirator Type" is printed to the left of two boxes in which "Full Face" and "Half Mask" are printed, so the person performing the test can circle one or the other to identify the "style" of the respirator tested. On all 14 of the records included in Exhibit 12, both "Full Face" and "Half Mask" have been encircled with a pen or pencil.

The same format is followed on the line below, with "Respirator Manufacturer" to the left of boxes in which "SurvivAir" and "3M" are printed. "SurvivAir" is encircled on each of the records and in the open space to the right of the "3M" box someone has hand-printed "Scott". "Scott" is encircled on 8 of the 14 records included in Exhibit 12.

"Respirator Size" is at the left on the following line opposite three boxes stating, "Small", "Med." and "Large". None of them have been encircled and there are no other hand-written entries on this line on any of the records.

Employer Exhibits K-1 and K-2 are the original records of the copies included in Exhibit 12 as 12-A and 12-B. The hand-written entries on the originals and the copies are the same, but on the originals the circles around "Half Mask" and "SurvivAir" are circles that someone made earlier on a form that was then copied to produce the forms used for Employer's fit tests. The preexisting, copied circles are distinguishable from the ball point pen ink the person who fit tested Employer's employees used to circle "Full Face" and print "Scott" on each of the originals, and circle "Scott" on Exhibit K-1. Crowley testified that the Code 3 & Associates fit tester who tested Employer's employees had no blank forms and had to copy a form intended to record the fit testing of a "Half Mask" "SurvivAir" respirator to someone else.

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Section 5144(m)(2)(A) requires employers to establish fit test records that, among other things, specify the "make, model, style and size of [the] respirator[s] tested." Section 5144(m)(2)(B) requires employers to retain the records until the next fit test, and section 5144(m)(4) states that employers must make the retained records "available upon request to affected employees and to the Chief [of the Division] … for examination and copying."

Employer relied on Code 3 & Associates to perform Employer's non-delegable duty to establish fit test records that specified the listed characteristics of the respirators tested.[4] One of the purposes of fit test recording is to provide the Division with a ready means of determining if the last test was done while employees were wearing the same respirators they are wearing during an inspection.

The records Employer made available to the Division did not specify the type, manufacturer, model and size of the respirators tested. Two types and

[4] See, e.g., *Cal-Cut Pipe & Supply Co.*, Cal/OSHA App. 76-955, Decision After Reconsideration (Aug. 26, 1980) and *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975) regarding the well settled rule that an employer who contracts with another person to perform the employer's safety order required duties remains responsible for violations caused by the other person's failure to comply with the safety order.

two manufacturers are specified for the same respirators and neither their model (Scott-o-rama) nor their size is specified.

One can distinguish between the pre-existing circles around "Half Mask" and "SurvivAir" if one has access to the originals and knows what to look for. But, even then, without further explanation, one could not be sure which type and manufacturer Employer intended the record to specify, since the pre-existing circles were left intact.

"Type" and "Model" apparently refer to different respirator characteristics, since they are stated separately in section 5144(m)(2)(A). As used in the Code 3 & Associates fit test form, "Type" refers to whether the faceplate on the mask covers the whole face or just the lower half. Manufacturers commonly produce different models of their products for a variety of reasons. The "Scott-o-rama" may be one of several models of Scott Aviation Corporation respirators still in production or use. At any rate, the model name or number is respirator identifying information that must be included in fit test records, and that information is not included in Employer's records.

The same is true of respirator size information. The Code 3 & Associates form does not include a box for "Single Size", "One-Size-Fits-All" or anything other than small, medium and large and nothing was handwritten in to inform a person reviewing the records that the respirators were single size. A record of the size of a respirator is most important to someone inspecting fit testing if that model comes in more than one size. If so, the inspector can then check the sizes on the test records against the sizes marked on the respirators the employees are wearing. That can be done if the records specify that all employees were tested wearing a particular type, make and model of single size respirator and all of the inspected employees are wearing the single size respirators specified in the test records. Nonetheless, if a tested respirator is single size, and that fact is recorded, the record provides information that may assist an employer or Division inspector detect employees who lost or damaged the respirator on which they were fit tested, and replaced it with, e.g., a small, medium or large size respirator.

Records should provide all of the required information clearly and completely. A fit test record that says nothing about the size of the respirator tested leaves a person reviewing the record with a question to answer. By omitting that required information Employer violated section 5144(m)(2)(A).

Citation 1, Item 8, General
Section 5194(f)(4)

ISSUES

1. Was Employer required to have a hazardous substance label, tag or marking on a tub containing sour diesel (diesel) that was used by employees to

remove crude oil sludge (sludge) from their personal protective garments and equipment (PPE)?

2. Was the tub properly labeled, tagged or marked?

EVIDENCE

Employees were in Tank 100 removing sludge from the walls and bottom. They were wearing supplied air respirators and personal protective garments and equipment. The sludge stuck to their PPE. Sour diesel (diesel) is a liquid that dissolves crude oil sludge. Employer placed a tub, approximately five feet square and two feet deep, next to Tank 100 and partially filled it with diesel. Employees exiting Tank 100 got into the tub and used the diesel to dissolve the sludge and wash it off their PPE.

As sludge mixed with the diesel in the tub, the diesel's effectiveness as a solvent diminished. Thus, at least once a day and more frequently if necessary, Employer pumped the diesel/sludge mixture out of the tub and refilled the tub with clean diesel.

Item 8 was issued because the diesel was a hazardous substance that exposed employees to health and physical hazards, making the labeling requirement applicable, and Compliance Officer Berg found no such label, tag or mark on the tub when he first inspected it.

Berg testified that he found no label on any side of the tub that provided the hazardous substance identification and warning required by section 5194(f)(4) when he examined it on the first day of his inspection. He photographed one sludge-coated side of the tub. The photograph was introduced as Division Exhibit 9. Berg added that he pointed out the lack of a label to Employer's Safety Manager Crowley and that when he returned the next day a label had been affixed.

Berg was shown Employer Exhibit D, which Crowley identified as a photograph of one of the [lipped] sides of the tub. The camera was to the left of and above the area photographed when the picture was taken and the sun was shining on part of the side of the tub. The photograph appears to depict a new blank white label, approximately five-inches square, stuck to the tub in the upper right hand corner of the side, which is in the sunlight. A foot or two to the left of the new label, there appears to be a dirty, wrinkled label of similar size. Berg testified that he did not recognize Exhibit D as a photograph of a side of the tub he inspected.

Crowley testified that he did not take the Exhibit D photograph but that it was "probably" taken around the same time as the Exhibit 9 photograph Berg took of another side of the tub. Crowley said that Exhibit D accurately depicted one side of the tub at the site shortly after a new label had been attached at Berg's request. Crowley had been working at the site for a few

weeks before the inspection. According to him, the dirty, wrinkled old label had been on the tub since before Employer began using the tub to hold diesel fuel to dissolve sludge on personal protective garments and equipment.

When initially asked what the old label said, he replied, "diesel." Later he testified that it also included hazardous substances warnings from the diesel MSDS and other sources. Crowley testified that "diesel" was stenciled on another side of the tub.

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

1. A Hazardous Substance Warning Label, Tag or Marking was Required on the Tub.

Employer was cited in Item 8 for violating section 5194(f)(4). Subject to specified exceptions, it requires an employer to:

> …ensure that each container of hazardous substances in the workplace is labeled, tagged, or marked with the following information:
>
> (A) Identity of the hazardous substance(s) contained therein; and
>
> (B) Appropriate hazard warnings.

Section 5194(c) defines "Hazardous substance" to mean, "Any substance which is a physical hazard or a health hazard or is included in the List of Hazardous Substances prepared by the Director pursuant to Labor Code section 6382."

Section 5194(c) defines a "Physical hazard" as, "A substance for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive." The general definition of a "Health hazard" in the same section is, "A substance for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees."

The Material Safety Data Sheet (MSDS) for the diesel was introduced as Division Exhibit 15. The MSDS reads, in part, as follow:

> **Health Hazards**: May contain or liberate poisonous hydrogen sulfide gas. Probable skin cancer hazard. Causes severe skin irritation. Aspiration hazard if swallowed. Can enter lungs and cause damage. Use ventilation adequate to keep exposure below

recommended limits, if any. Avoid breathing vapor or mist. Avoid contact with eyes, skin and clothing. Do not taste or swallow. Wash thoroughly after handling.

Physical Hazards: Flammable liquid and vapor. Keep away from heat, sparks, flames, static electricity or other sources of ignition.

The MSDS states that the National Fire Protection Association (NFPA) classifies the diesel as a moderate health hazard. It also states that the diesel's "OSHA Flammability Class" is "Combustible liquid."

Employer was cleaning tank 100 for Tosco, the company responsible for preparing the diesel MSDS (Exhibit 15, p.1), and Employer provided Berg with the MSDS when he asked for information concerning the diesel's properties. Employer witness Crowley testified that Employer stenciled "diesel" on one side of the decontamination tub and affixed a diesel hazard warning label to another side before the inspection.

From this evidence we infer that Employer knew of the contents of the MSDS and manifested adoption of its contents. Thus, we find that, by Evidence Code section 1221[5], the statements contained in the MSDS are excepted from the hearsay rule as admissions adopted by Employer.[6] Accordingly, under the Board's Rules of Practice and Procedure, section 376.2, the MSDS statements alone may support a finding that the diesel was a hazardous substance for purposes of the section 5194(c) definition and the section 5194(f)(4) labeling requirement, unless nullified by other evidence that it was not hazardous, or by a showing that section 5194(f)(4) did not apply to the diesel, as it was contained in the tub, under one of the "Scope and Application" limitations set forth in section 5194(b).

Employer offered no evidence at the hearing to prove that the diesel is not a hazardous substance, and does not so argue in its petition for reconsideration. Hence, based upon the statements contained in the MSDS, it is found that the diesel is a hazardous substance for section 5194 purposes.

In its petition, Employer contends that section 5194 does not apply to the contents of the tub by virtue of section 5194(b)(5)(A), which states that section 5194:

…does not apply to …[A]ny hazardous waste as such term is defined by the Solid Waste Disposal Act, as amended by the

[5] Evidence Code section 1221 provides that, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

[6] The MSDS contents may also be admissible hearsay under the Evidence Code section 1340 exception for statements made in a published compilation that "is generally used and relied upon as accurate in the course of a business as defined in [Evidence Code] Section 1270." (See; *In re Michael G.* (1993) 19 Cal. App. 4th 1674).)

Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6901 et seq.), when subject to regulations issued under that Act by the Environmental Protection Agency.

Employer argues that the contents of the tub was "hazardous waste", as that term is defined in the Solid Waste Disposal Act, subject to EPA regulations, and, therefore, not covered by the cited sub-provision of section 5194; section 5194(f)(4). The argument is premised upon Employer's interpretation of 40 CFR 261.3(b) of the implementing EPA regulations. It provides in part that, "(b) A solid waste[7] [the diesel in this case] which is not excluded from regulation under paragraph (a)(1) of this section becomes a hazardous waste when… a hazardous waste listed in subpart D [the oil sludge] is first added to the solid waste." However, both 42 U.S.C. 6903 of the amended Solid Waste Disposal Act and 40 CFR 261.2 provide that a material is not a "solid waste" until it is "discarded", and Employer did not discard the diesel it put in the tub, it was put there to be used for the business related purpose of removing oil sludge from employees' personal protective garments and equipment.

Under the amended Solid Waste Disposal Act, only a "solid waste" becomes a "hazardous waste" when mixed with another substance meeting the definitional criteria of a "hazardous waste." The diesel was not a "solid waste" during its useful life as a solvent for removing "hazardous waste" sludge from employees' PPE. Therefore, its commingling in the tub with the sludge it washed off of employee PPE during its useful life as a solvent did not convert the diesel to a "hazardous waste" covered by the amended Solid Waste Disposal Act and regulated by the EPA (40 CFR 261.2(b)). Since the diesel was not a hazardous waste, section 5194(b)(5)(A) did not exempt its container, the tub, from the section 5194(f)(4) labeling requirements.

2. The Tub was not Properly Labeled, Tagged or Marked at the Time of the Inspection.

Berg testified that when he inspected the tub, he walked around it, looked at all four sides, and saw no label, tag or marking warning of the hazardous substance it contained. Crowley testified that, at that time, there was an old label on one side of the tub and a stencil of the word "diesel" on another. Their testimony appears to conflict but may be reconciled.

When Berg inspected, the side of the tub he photographed in Exhibit 9 was covered with a thick coat of black, sticky sludge that would have made it impossible to see any stencil or label that may have been on the tub wall under the sludge. It is inferred that sludge also had slopped over the tops of the other three tub walls, similarly coated their exterior sides and, thus, obscured any stencil or label that may have been on those sides.

[7] 42 USC 6903 of the amended Solid Waste Disposal Act defines "solid waste" to include, "…discarded material, including solid, liquid, semisolid, or contained gaseous material…." (Emphasis added.)

Crowley did not take the other tub photograph, Exhibit D, and was not present when it was taken but he had observed what it depicts and testified that it shows another wall of the same tub as it appeared shortly after a new label had been affixed at Berg's direction. Exhibit D shows both an old wrinkled, scarred and dirty label and a new one, with no visible printing on it, on the side of a tub. The metal tub wall appears to be free of sludge, as it had to be, to provide a surface to which the new label could adhere. Therefore, it is inferred that whoever affixed the new label cleaned that side of the tub before doing so and uncovered what remained of the old label in the process.

From the foregoing evidence and inferences, we conclude that there was a label and a stencil of the word "diesel" on sides of the tub when Berg inspected, but that they were covered with sludge and could not be seen.

However, if a safety order requires an employer to provide employees with a warning label or other safety device and the device, as provided, is incapable of performing the safety function it is intended to perform, the employer is in violation of the safety order. (See *Tutor-Saliba-Perini*, Cal/OSHA App. 98-812, Decision After Reconsideration (Aug. 7, 2001) [painted over label on roll-over protective structure]; See also, *Ford Construction Co., Inc.,* Cal/OSHA App. 86-459, Decision After Reconsideration (Sept. 23, 1987) and *E. L. Yeager Construction Company, Inc.* Cal/OSHA App. 79-1406, Decision After Reconsideration (July 29, 1982) [backup warning devices that did not function properly].)

When Berg inspected the tub, the old label and stencil were obscured from view by sludge coating the tub's exterior walls. Thus, even if the old label did contain the hazard warning information required by section 5194(f)(4), it did not provide the warning to the employees working in and around the tub and exposed to its hazardous contents for whom the warning was intended. For these reasons, we find that the section 5194(f)(4) violation alleged by the Division was established.

DECISION AFTER RECONSIDERATION

Employer's appeal is denied. The ALJ's decision is reinstated and affirmed.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 30, 2003